

88-156.

Supreme Court, U.S.

FILED

JUL 21 1988

JOSEPH E. SPANIOLO, JR.
CLERK

NO.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

MARTHA DAVISON, ET AL., PETITIONERS

VS.

SAM LOWERY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE
ALABAMA SUPREME COURT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether petitioners are the owners of the land due to adverse possession.

2. Whether petitioners procedural and substantive due process rights under the Fifth and Fourteenth Amendments to the United States Constitution were violated.

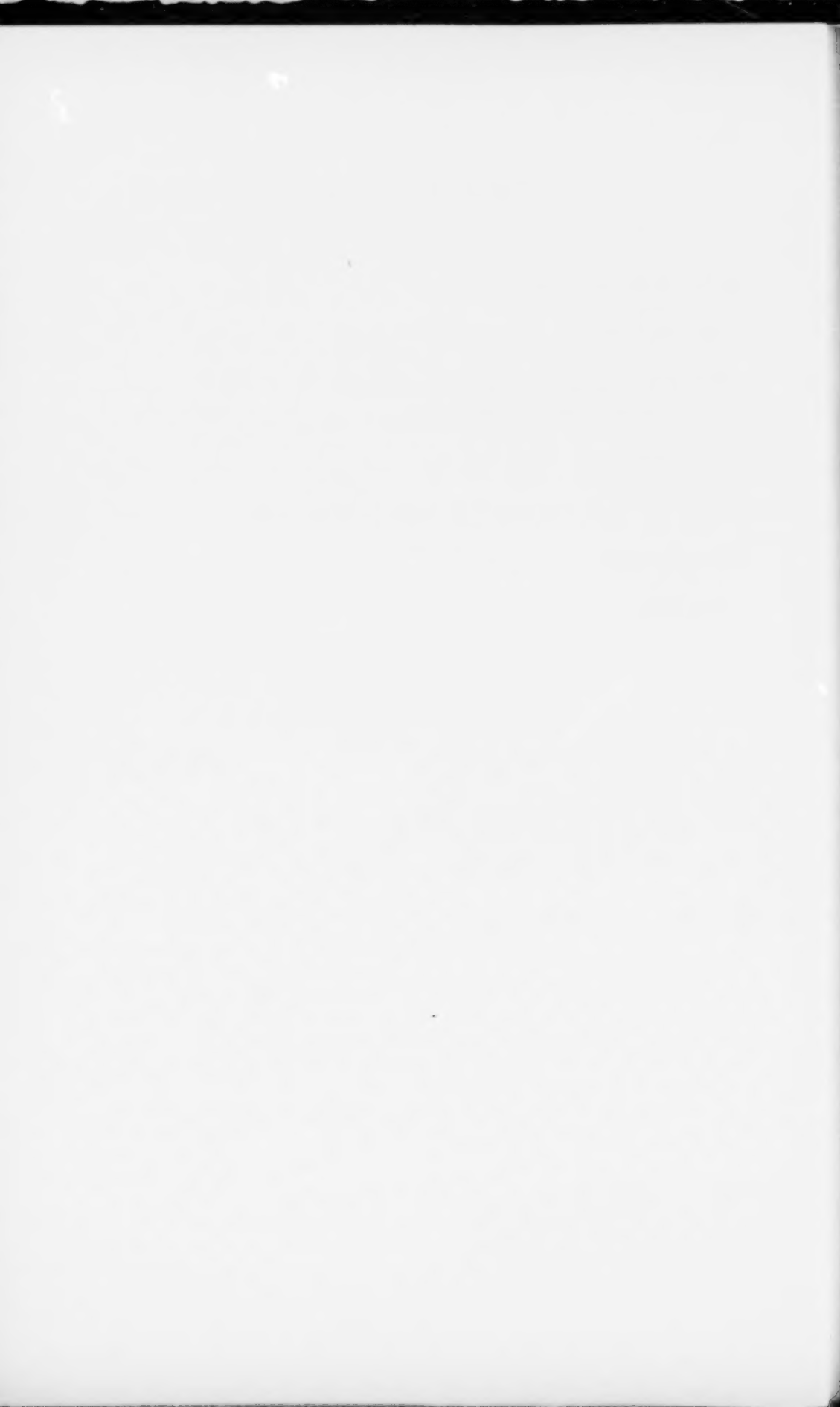


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V.

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PETITION FOR A WRIT OF CERTIORARI TO
THE ALABAMA SUPREME COURT

The Honorable Lewis Daniel Turberville,
on behalf of Martha Davison, et al., petitions for a writ of certiorari to review the judgment of the Alabama Supreme Court in this case.

*The other parties to this case are petitioners, Leola T. Robinson, Thomas O. Tait, Eloise Wiggins, Mable Richardson, Julia McClammey, Rose Goldsmith, James V. Tait, Robert E. Tait, William Tait, Sherese Tait, Arnetta Salter, Emerson Bernard Tait, Mary Alice Stallworth, Cassie Banks, Talmadge Tait, Alfred Tait, Erma Tait, Palton Tait, and Mia Tait and respondents Sam Lowery individually and as trustee of the J. F. B. Lowery Trust.



OPINIONS BELOW

The opinion of the Alabama Supreme Court [Ms. Feb. 26, 1988, 86-1056] ____ So.2d ____ (Ala. 1988) (infra, App. 5) has not yet been reported. The opinion of the Circuit Court for the Thirty-Fifth Judicial Circuit, Monroe County, Alabama (infra, App. 1) is not reported.

JURISDICTION

The judgment of the Alabama Supreme Court (infra, App. 12) was entered on February 26, 1988. A petition for rehearing (infra, App. 14) was denied on April 22, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property without due process of law . . .".

2. The Fourteenth Amendment to the United States Constitution provides in relevant part: ". . . nor shall any State deprive any person of life, liberty or property, without due process of law; . . .".

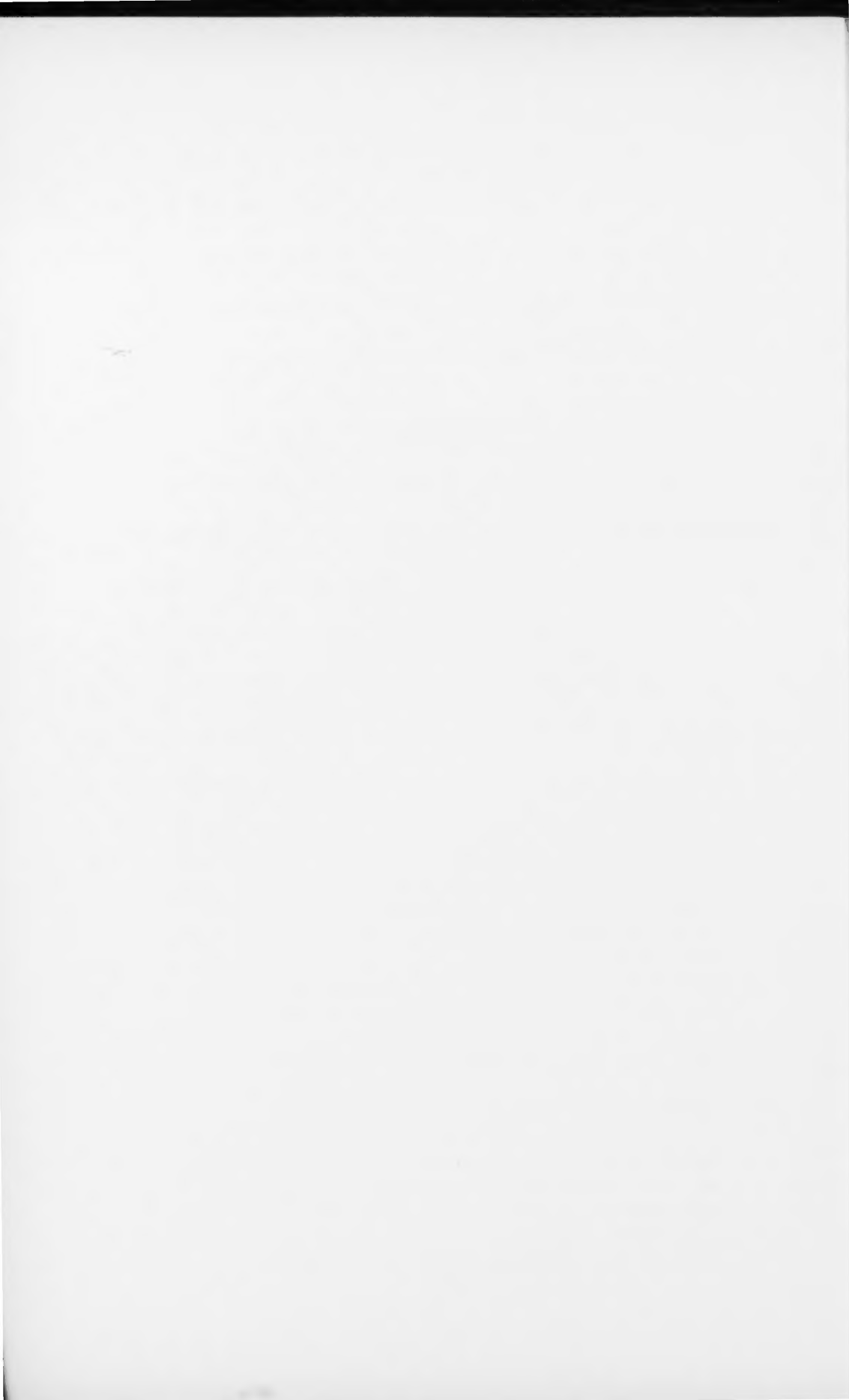
STATEMENT

Simply put, this case deals with ownership of two (2) parcels of property in Monroe County, Alabama. The petitioners are the children and grandchildren of DeWitt Tait, who the petitioners state, was the rightful owner of the land. For purposes of clarity and brevity, the following described property will be referred to as Parcel A:

4 acres of land in the southeast corner of the northeast quarter of the southeast quarter of the southeast quarter, Section 21, Township 7, Range 9, in Monore County, Alabama.

The following described property will be referred to as Parcel B:

Beginning at a stake 416 feet north of the southeast corner of the northwest quarter of the southeast quarter, Section 21, Township 7, Range 9, thence west 416 feet,



thence north 314.4 feet, thence east 416 feet, thence south 314.4 feet to the point of beginning, containing three (3) acres.

Furthermore, the following genealogical chart will help serve the purposes of clarity and brevity.

John Tait and Rachel Tait (as his wife.)

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Frank Tait

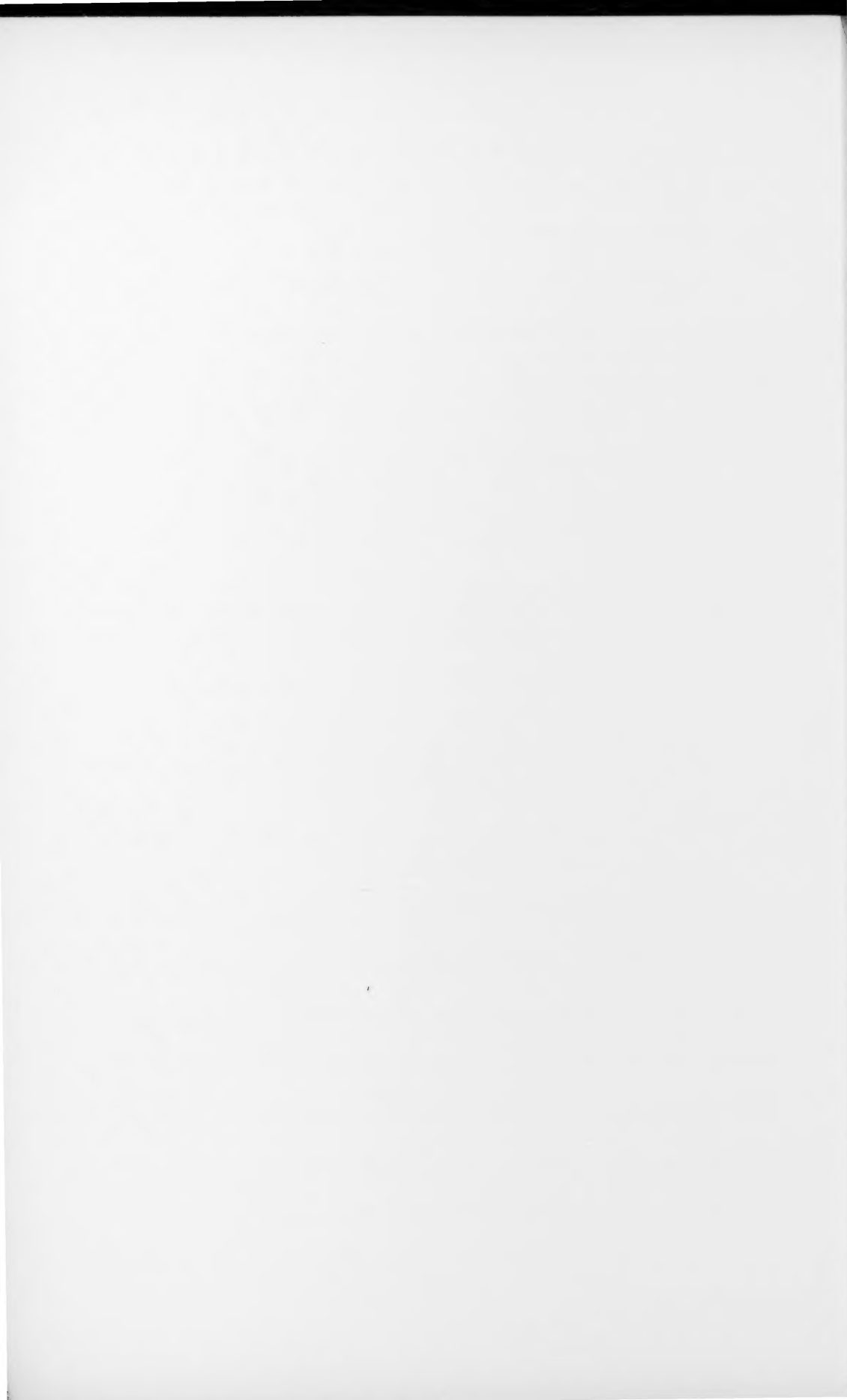
Prince A. Tait and Rose Tait
(as his wife.)

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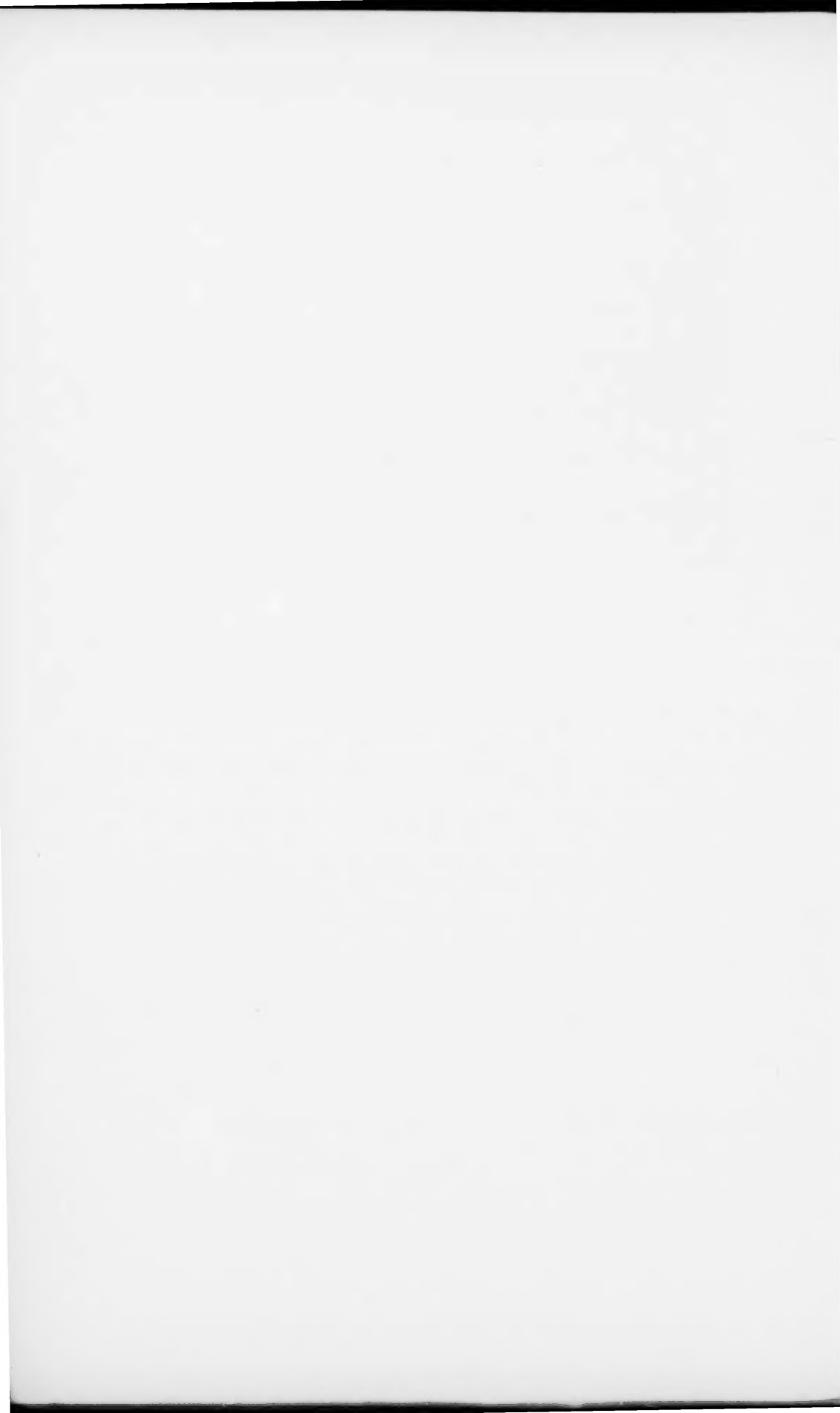
DeWitt T. Tait and Willie Tait
(as his wife.)

Parcel A

Before January 14, 1935, parcel A was owned by P. A. and Rose Tait. On January 14, 1935, P. A. and Rose Tait mortgaged the property to their son DeWitt Tait for \$40.00. The mortgage was to be fully satisfied by September 1, 1935. The mortgage was was notarized by H. R. Betts. (R. 88).



There was no documentation concerning the parcel filed at the Monroe County Courthouse until July 25, 1940. On July 24, 1940, a document was filed into Monroe County Probate Court stating that DeWitt Tait had assigned the \$40.00 mortgage taken from his parents to J. F. B. Lowery on July 26, 1936. However, the document does not state the book or page number, nor the amount of consideration for the assignment. The document goes on to state that P. A. and Rose Tait had defaulted on the mortgage and J. F. B. was foreclosing on, and selling the property. The document also states that notice of the foreclosure sale was given for four consecutive weeks in the Monroe Journal, a newspaper published and circulated in Monroe County, Alabama. That after such notice, J. F. B. Lowery purchased the parcel for \$117.00. The document was notarized by H. R. Betts. (R. 18, 34, and 99).



On March 29, 1952, Monroe County Circuit Court issued an order reforming the mortgage and foreclosure deed to correctly describe parcel A as follows:

Four acres of land in the southeast corner of the northwest quarter of the southeast quarter, Section 21, Township 7 North, Range 9 East, Monroe County, Alabama. (R. 35).

Parcel B

On September 25, 1912, P. A. and Rose Tait purchased 16 acres, containing part of the land described herein as Parcel B, by a warranty deed from W. T. Auburn and his wife, P. E. Auburn for \$36.00. (R. 51). On March 4, 1935, P. A. and Rose Tait purchased 13 acres containing the remaining part of parcel B, by a warranty deed, from all the heirs of John and Rachel Tait, for \$1.00. The document was notarized by H. R. Betts. (R. 52). On March 5, 1935, P. A. and Rose Tait sold parcel B, by a warranty deed, to their son DeWitt Tait for \$50.00. The document was notarized by H. R. Betts. (R. 104, 107).



At this point in the record, there is some contradiction as to who sold parcel 3 to DeWitt Tait. In one instance, the records cited above indicate that DeWitt Tait's mother and father, P. A. and Rose Tait owned the property in fee simple and sold it to DeWitt for \$50.00. (R. 104, 107). However, the record later indicates that property was sold to DeWitt Tait on December 26, 1936, for \$50.00 by the heirs and their spouses, of John and Rachel Tait. This document was also notarized by H. R. Betts. (R. 53, 54, 117, 118). In any event, it is clear that DeWitt Tait owned parcel B prior to December 29, 1936.

On December 29, 1936, DeWitt Tait and his wife Willie Tait, mortgaged the property to Peterman State Bank, a local bank in Monroe County for \$52.65. Again, this document was notarized by H. R. Betts. (R. 55). On January 28, 1938, Peterman State Bank sold/transferred the mortgage to Peterman Agricultural Credit Corporation. No con-

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sideration for the sale or transfer was noted. (R. 56). On February 15, 1938, Peterman Agricultural Credit Corporation foreclosed on the mortgage due to default. (R. 57, 100). The foreclosure document indicates that after giving notice of its intention to sell, notice was posted at the door of the Monroe County Courthouse and at one other public place in Monroe County, ten (10) days prior to sale. On February 12, 1938, the property was bought by Peterman Agricultural Credit Corporation for \$150.00. (R. 57, 58, 100, 101).

On January 18, 1944, Peterman Agricultural Credit Corporation sold parcel B for \$250.00 to Willie Harris. (R. 49). Mr. Harris also happened to be an heir of John Tait, DeWitt Tait's grandfather, although it is unknown how Mr. Harris and DeWitt Tait are related.

Once again, confusion and contradiction arises in the record. As the record indicates, Willie Harris purchased parcel B on

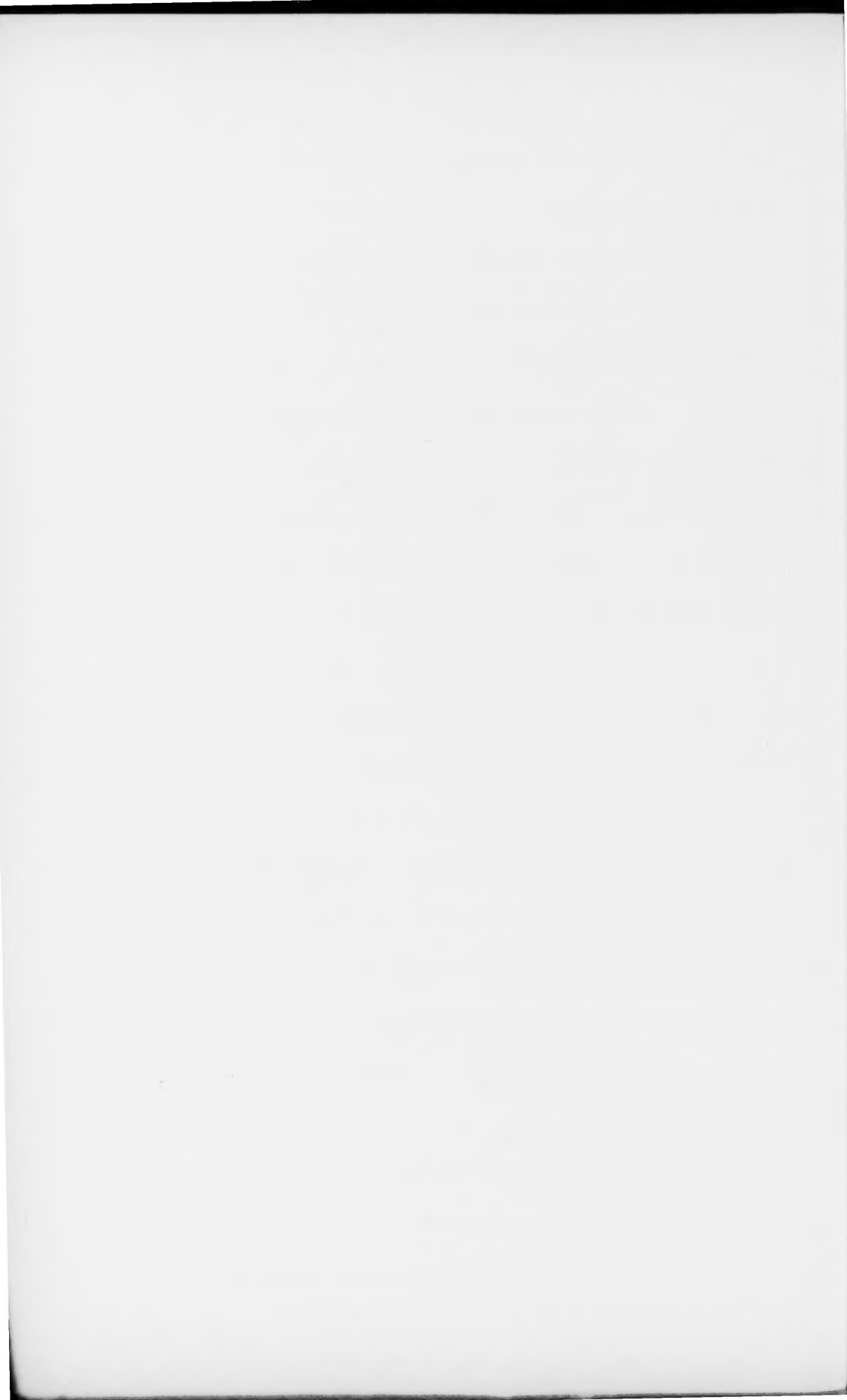
January 28, 1944 for \$250.00. (R. 49). The next entry in the record regarding court documents as to parcel B, is a register's deed filed in Monroe County Courthouse on July 28, 1965. (R. 47-48, 110-111). This document recites that parcel B was sold for \$3,268.00 to Sam G. Lowery, the son of J. F. B. Lowery, as trustee of the J. F. B. Lowery Trust. The sale was in response to a suit for sale and division filed by Frank Tait, the brother of P. A. Tait and an heir of John Tait, against the property. Elizabeth Snyder, also an heir of John Tait, represented the other, numerous heirs of John Tait, of which Willie Harris was one. It is important to note that this document was not filed into Court until July 28, 1965.

The Action

On March 20, 1985, Martha Davison, the daughter of DeWitt Tait, brought an action against Sam Lowery, individually, and as trustee of the J. F. B. Lowery Trust. The

action sought to have the property described above as parcels A and B returned to the heirs of DeWitt Tait and also sought \$5,000.00 in damages. (R. 7-8). The remaining heirs of DeWitt Tait, known and unknown, were granted intervention into the action on March 5, 1986. (R. 63). On January 21, 1987, a trial was had on the action. (R. 285). There were two (2) ultimate issues at trial, adverse possession and due process. Mrs. Davison claimed that as her father had lived on parcel A until his death in 1966, he maintained title to the parcel through adverse possession. Mrs. Davison also asserts that because of missing documents and failure to follow proper procedures in notifying parties to certain actions and improper acknowledgements of documents, her father, DeWitt Tait, was denied due process.

At trial, it was stipulated that, as to parcel B, that the register's deed recites that it was done in accordance with a decree



of the Circuit Court of Monroe County, Alabama, but that it could not, and cannot, be located. (R. 291-292). It was further stipulated that there were no cost taxed for the credit of the sheriff, which indicates there was no personal service had on the heirs of John Tait, who owned the property. (R. 292).

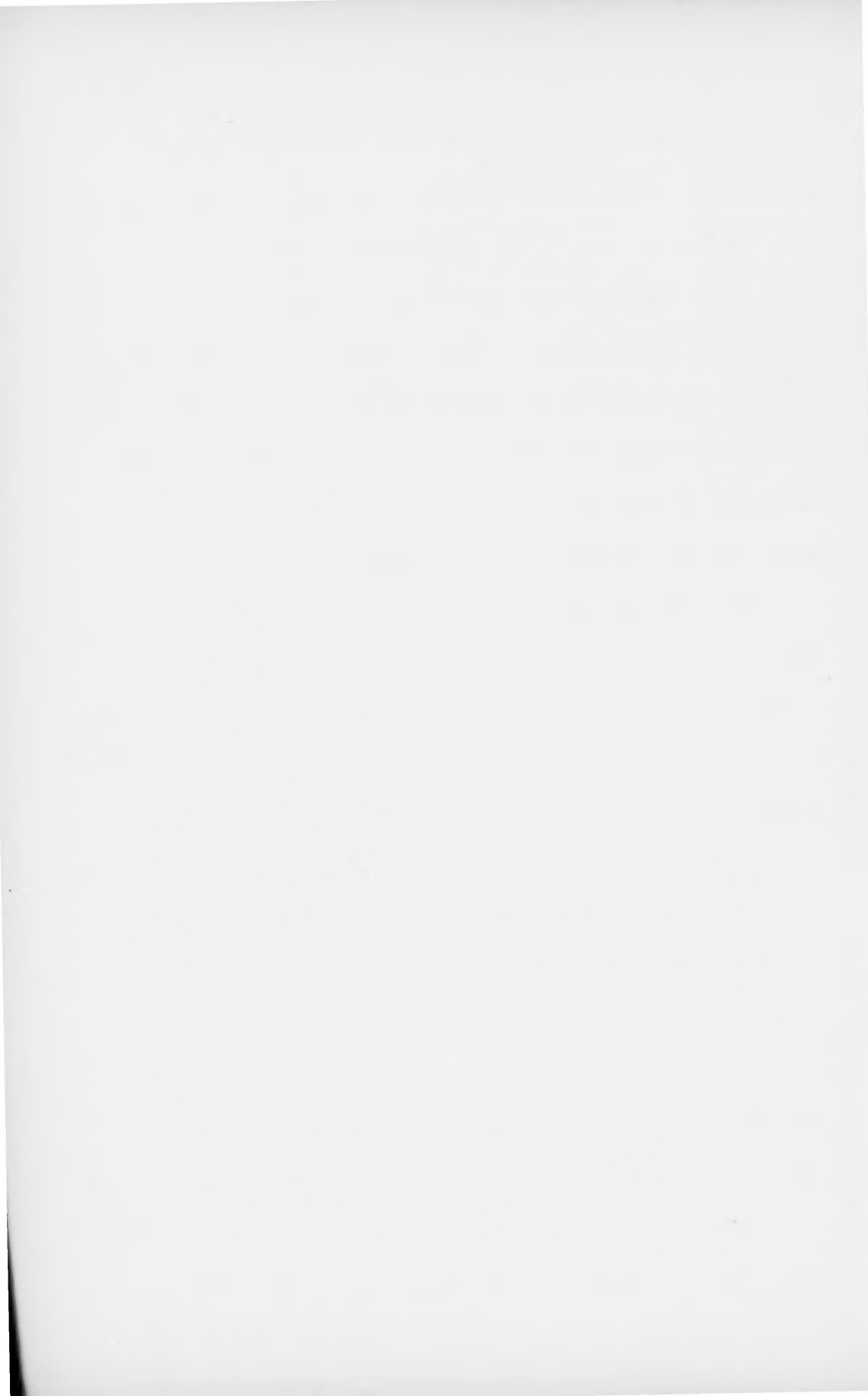
Mrs. Davison was born on July 17, 1931, and lived with her family on parcel B (R. 290) until she married and moved away in 1951. (R. 304). Her father, Dewitt Tait, lived on parcel B until this death in 1966. (R. 230-231). Five (5) members of Mrs. Davison's family are burined on parcel B (. 314). After her father died, Sam Lowery demolished their house (R. 325) and left all the personal property on the demolished lot. (R. 324). After DeWitt Tait died, Mrs. Leola T. Robinson, daughter of DeWitt Tait and sister to Mrs. Davison, attempted to pay the yearly taxes on the parcels. (R. 318). A clerk at the Monroe County Tax Assessor's



office informed her that the land had been assessed to Mr. Sam Lowery and he had paid the taxes on it. (R. 318-319). Mrs. Robinson approached local attorneys on two separate occasions in an attempt to have the matter investigated and resolved. Both times the attorneys stated that "it was such a mess between a black and a white that they did not want to be bothered with it." (R. 329-331).

At the age of ten (10) years, Mrs. Robinson was a house servant for J. F. B. Lowery and his wife, Eloise. She testified as to a conversation that was had between Lowery and his wife regarding the property. (R. 362). Mr. Lowery stated "Sam [Mr. Lowery's son, the respondent in this case] said he wasn't gonna let DeWitt have it back. I told Sam to give DeWitt his land back for his children -- them black children has worked too hard to not have nowhere to say." (R. 326).

DeWitt Tait had mortgaged the property so that he could bury his father, P. A. Tait.



(R. 327). DeWitt Tait would offer J. F. B. Lowery money to pay their debts, although it is not known what debts specifically, but Sam Lowery refused it. (R. 210). DeWitt Tait never paid anyone any rent to live on the property. (R. 307).

At the time of DeWitt Tait's death, all his children had moved away and his wife had died in 1952. The children would return several times a year to maintain the grave-site on the property and the property itself, to some extent. They are the only ones who did this. The Lowerys have made no attempt to maintain the property. While the Tait's did cultivate the property during their father's lifetime, there has been no cultivation by anyone since.

Thus, ended the adverse possession phase of the trial. Instead of hearing testimony as to the due process violations, trial counsel for the petitioners submitted a written proffer of evidence. Such proffer showed the following:



John Sawyer, Clerk of the Monroe County Circuit Court, having the responsibility for the care, custody and control of the official records of the Circuit Court, was ordered by the trial court to locate and produce certain documents. Mr. Sawyer was unable to produce these records, which included the files of the lawsuits Lowery v. Tait or Tait v. Lowery, case number 2203; the file of the lawsuit of Snyder v. Mosley, case number 3080 in Equity; the docket sheets for the aforesaid cases and any checks issued in regards to the lawsuits. Mr. Sawyer also examined the consolidated docket and fee book, Equity Division, Circuit Court of the period in which Snyder v. Mosley, case number 3080, took place. (R. 344). He saw that there were no sheriff's fees for personal service of process in this case. Furthermore, there were no dates of checks nor check numbers to indicate that any of the defendants had ever received any money from the court for their interest in the land.

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The records do indicate that Mr. Lowery paid \$3,268.00 into court on July 3, 1959. It is not known what happened to this money.

Service of process was through publication. (R. 345). Mr. Sawyer stated that he had no knowledge of the reason that this information would be missing. Pictures of the room where these records were kept were presented into evidence. These pictures showed the documents and other items in the room were in an extreme state of disarray, confusion, and misfiling. (R. 347).

The custodian of records for the Monroe Journal, a local newspaper published and circulated in Monroe County, Alabama, stated that she made a diligent search and inquiry of the records of the Monroe Journal for publication of process for the case of Tait v. Snyder, et al., or Snyder v. Mosley, et al. She stated that there were only two (2) dates for publication of process, May 14, 1959, and May 21, 1959. (R. 347).

Kenneth D. Palmer, a licensed real estate broker in the State of Alabama, stated that on many occasions he has examined property records, mortgages, deeds, assignments and real estate notes and has on many occasions searched the records of the probate offices in Alabama and is familiar with how to find such records. Mr. Palmer stated that he personally examined the records of land transactions between P. A. Tait, Rose Tait and DeWitt and transactions between DeWitt Tait and J. F. B. Lowery, and his findings were as follows:

1. He searched for the case of Snyder v. Mosley, case number 3080, and Lowery v. Tait, case number 2208 and were unable to find both files. (R. 348).

2. He examined the records of the Monroe Journal and discovered that the foreclosure add, relating to parcel A, did not state the place of the sale, therefore, the record does not indicate if a sale took place on July 25, as stated in the foreclosure notice.



3. Mr. Palmer discovered that after the alleged sale of foreclosure in 1940, Mr. J. F. B. Lowery waited more than one (1) year to get a Conecuh County notary to notarize the deed, wherein Mr. Lowery, as donee of the power of sale, conveyed the land pursuant to the sale to himself individually. (Conecuh County is an adjoining county to Monroe County, Alabama).

4. The register's deed arising out of a decree dated June 5, 1959, in Tait v. Snyder, et al., recites that the sale took place on June 29, 1959, but the register's deed is not dated until July 28, 1965.

5. The mortgage of January 15, 1935, from P. A. Tait and Rose Tait to DeWitt Tait, originally in the amount of \$40.00 was notarized by H. R. Betts, alleging he was a notary public in Monroe County, Alabama, but after a review of the public records for notaries public, Mr. Palmer found that Mr. Betts, was not, at that time, a notary public in Monroe County. (R. 349).

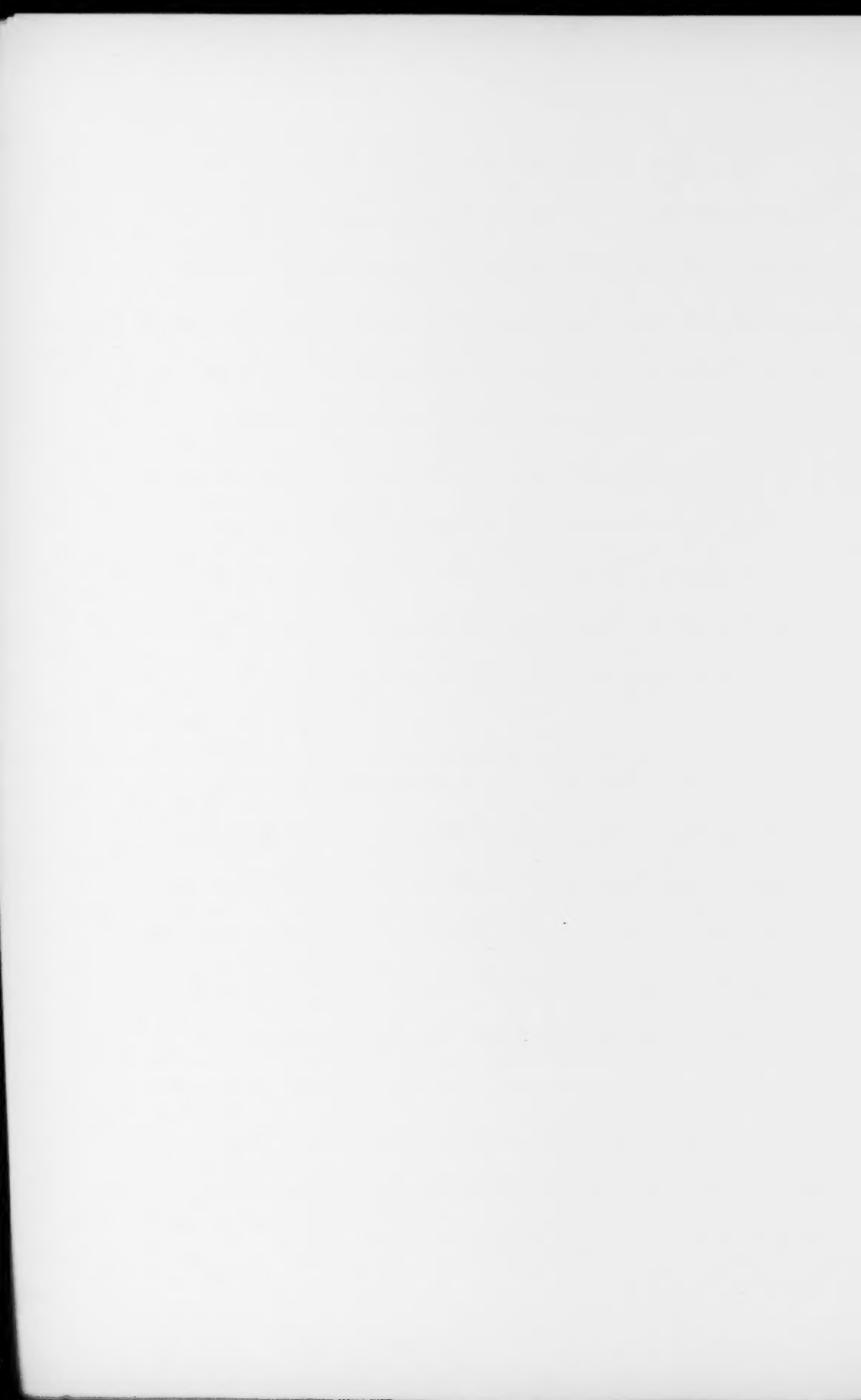


6. The original mortgage from P. A. Tait and Rose Tait to DeWitt Tait was in the amount of \$40.00 in 1935. However, it is stated in the foreclosure deed, that Mr. J. F. B. Lowery, bought the property at the foreclosure sale for \$117.00. (R. 349).

7. H. R. Betts, whose name appears as a notary in several of these transactions, was not a notary public in Monroe County, nor for the State of Alabama at large. His guarantor or surety was a Mr. J. F. B. Lowery. (R. 350).

8. Mr. Palmer also examined other cases of a similar nature to the ones involved herein, at the same time periods as the cases involved herein. Mr. Palmer discovered that the deficiencies noted above were not present in the other cases that he examined. (R. 122).

On February 18, 1987, the trial court made the following findings of fact, conclusions of law, and final order:



1. That the register's deed dated July 28, 1965, is a good a valid deed and effectively conveys to defendant Lowery, inter alia, the four (4) acre parcel, parcel A, and the three (3) acre parcel, parcel B. This deed effectively conveys the interest of DeWitt Tait, the plaintiff and intervenor plaintiffs predecessor and title to the defendant Lowery.

2. That the case of Frank Tait v. Elizabeth Snyder, et al., proceeded to final decree of sale dated June 5, 1959.

3. That on June 29, 1959, Sam G. Lowery, as trustee, was the highest and last bidder and thereby purchased the property in question, having paid the purchase price recited therein into court.

4. That all parties were properly before the court in said proceedings and that those proceedings were proper in every respect and effectively convey the entire undivided fee interest to defendant Lowery as trustee.



5. The Court found insufficient evidence to establish adverse possession in the plaintiffs and intervenor plaintiffs. (R. 191-193).

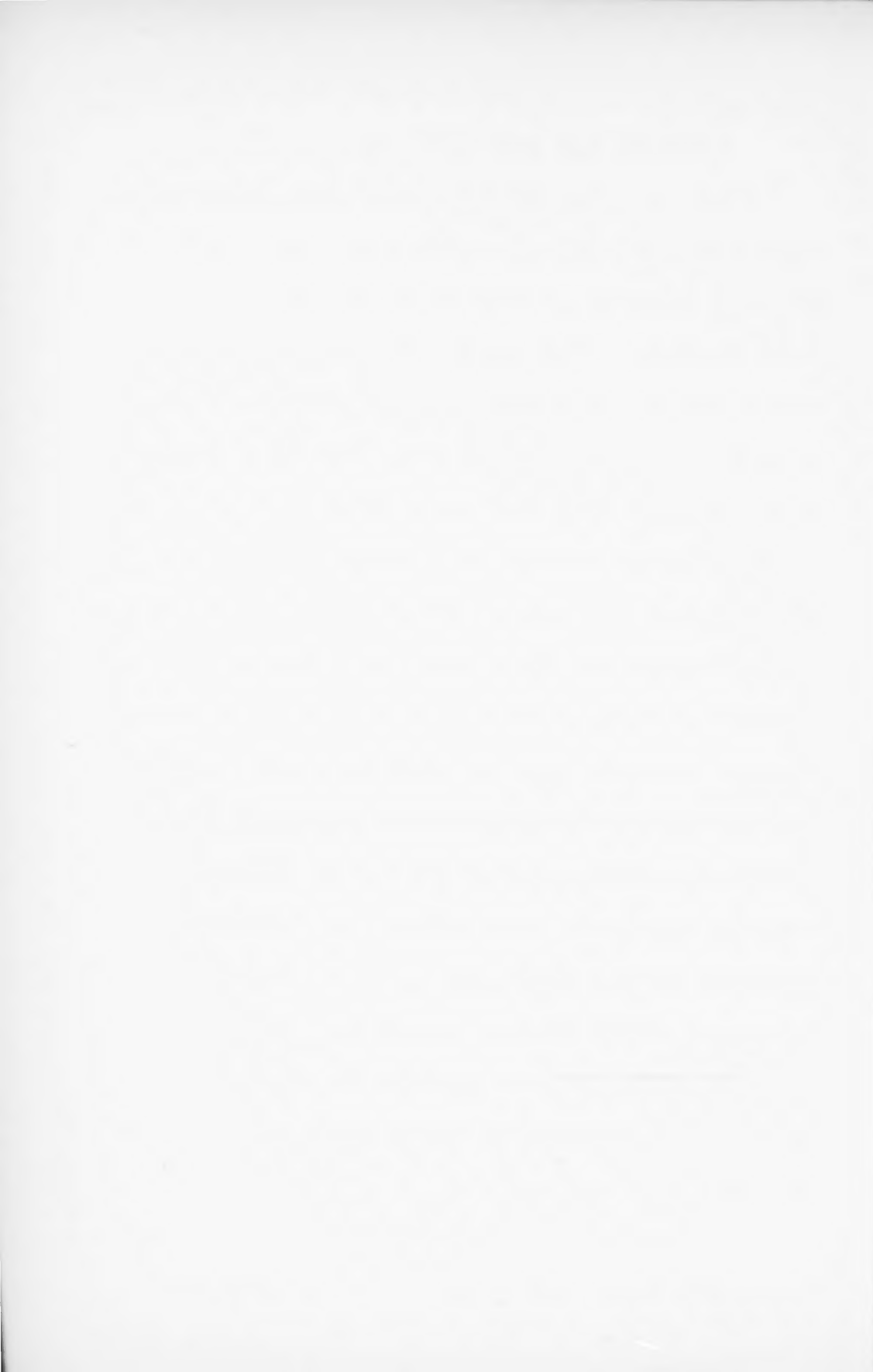
Ms. Davison, and the other plaintiffs, appealed to the Alabama Supreme Court alleging once again adverse possession and violation of due process. In its opinion (infra, App. 12), the Alabama Supreme Court affirmed the trial court's decision. The Alabama Supreme Court found that because counsel for the petitioners did not raise adverse possession issue on appeal that it was waived. The Alabama Supreme Court also found that under Alabama's twenty (20) year rule of repose, the time for questioning any of the transactions involved herein had passed. The petitioner's application for rehearing to the Alabama Supreme Court (R. 14) was denied.



REASONS FOR GRANTING THE PETITION

This case is indicative of the injustices that were visited upon the black in the black belt of Alabama in the early and mid-part of this century. The opinions of the trial court and the Alabama Supreme Court are in direct contradiction of the federal statutes and case law that has been expounded to correct these severe injustices. That the petitioners' property was stripped from them in disregard to the proper procedures governing such takings, is a clear violation of due process, taking several forms. That the petitioner's predecessor continue to adversely occupy the property as before the taking occurred, long after the respondents alleged it was sold, establishes the petitioner's right to the property. This is the type of conduct long opposed by this Court and should be harshly dealt with in the case at bar.

1. "The law of the state where the real property lays, controls on the question of



adverse possession." Christ Church Pentecostal v. Richterberg, 334 F.2d 869, cert. denied, Wittich Memorial Church v. Richterberg, 379 U.S. 1000; 85 S.Ct. 719; 13 L.Ed.2d 702 (10th Cir. 1964). §6-5-200 Code of Alabama (1975), sets forth the requirements of adverse possession in Alabama. The statute states:

(a) Adverse possession cannot confer or defeat title to land unless:

(1) The party setting it up shall show that a deed or other color of title purporting to convey title to him has been duly recorded in the office of the judge of probate of the county in which the land lies for 10 years before the commencement of the action.

(2) He and those through whom he claims shall have annually listed the land for taxation in the proper county for 10 years prior to the commencement of the action if the land is subject to taxation; or

(3) He derives title by descent cast or devise from a predecessor in the title who was in possession of the land.

(b) If the period during which the party's deed or color of title has been on record, added to the time during which the deeds or color of

title of those through whom he claims have been on record, amounts to 10 years, he may defend or prosecute on his adverse possession, and an inadvertent failure to list the land for taxation, any unintentional mistake in the description assessment or unintentional omission of any part of it from the assessment during the period of 10 years shall not bar the party of his action or defense on his adverse possession.

(c) This section shall not be construed to affect in any way a title perfect by adverse possession before the adoption of this Code, nor to deprive any person of his rights under sections 6-6-286 through 6-6-289, nor to affect cases involving a question as to boundaries between coterminous owners. (Code 1896, §§ 1541-1546; Code 1907, § 2830; Code 1923, § 6069; Code 1940, T. 7, § 828).

The elements of title by adverse possession are:

(1) such possession as the land reasonably admits of, (2) openness and notoriety and exclusiveness of possession, (3) hostility toward everybody else in respect of possession, (4) holding possession under claim or right of claim of color of title and (5) continuity for statutory period of 10 years.

Long v. Ladd, 273 Ala. 410; 142 So.2d 660

(Ala. 1962). Therefore, Alabama law is directly in concert with the elements of

adverse possession that have been espoused by the federal courts. See Bynum v. Liberty National Bank and Trust Co. of Oklahoma City, 338 F.2d 412 (10th Cir. 1964).

As shown in the facts above, DeWitt Tait allegedly lost his ownership interest in parcel A on July 24, 1940 and in parcel B on February 15, 1938. However, DeWitt Tait maintained actual possession of parcel B and constructive possession of parcel A until his death in 1966. He and his family lived on the property, maintained it, cultivated it and paid no rent whatsoever. Nor has there been any allegations whatsoever that DeWitt Tait was under any type of lease agreement with anyone as to the property. No other person occupied the property during the relevant time, nor is it occupied at present. The respondents clearly knew or should have, of the adverse possession by DeWitt Tait, as they all lived in a small rural community and evidenced by the respondent's destruction of DeWitt Tait's house soon after he died.

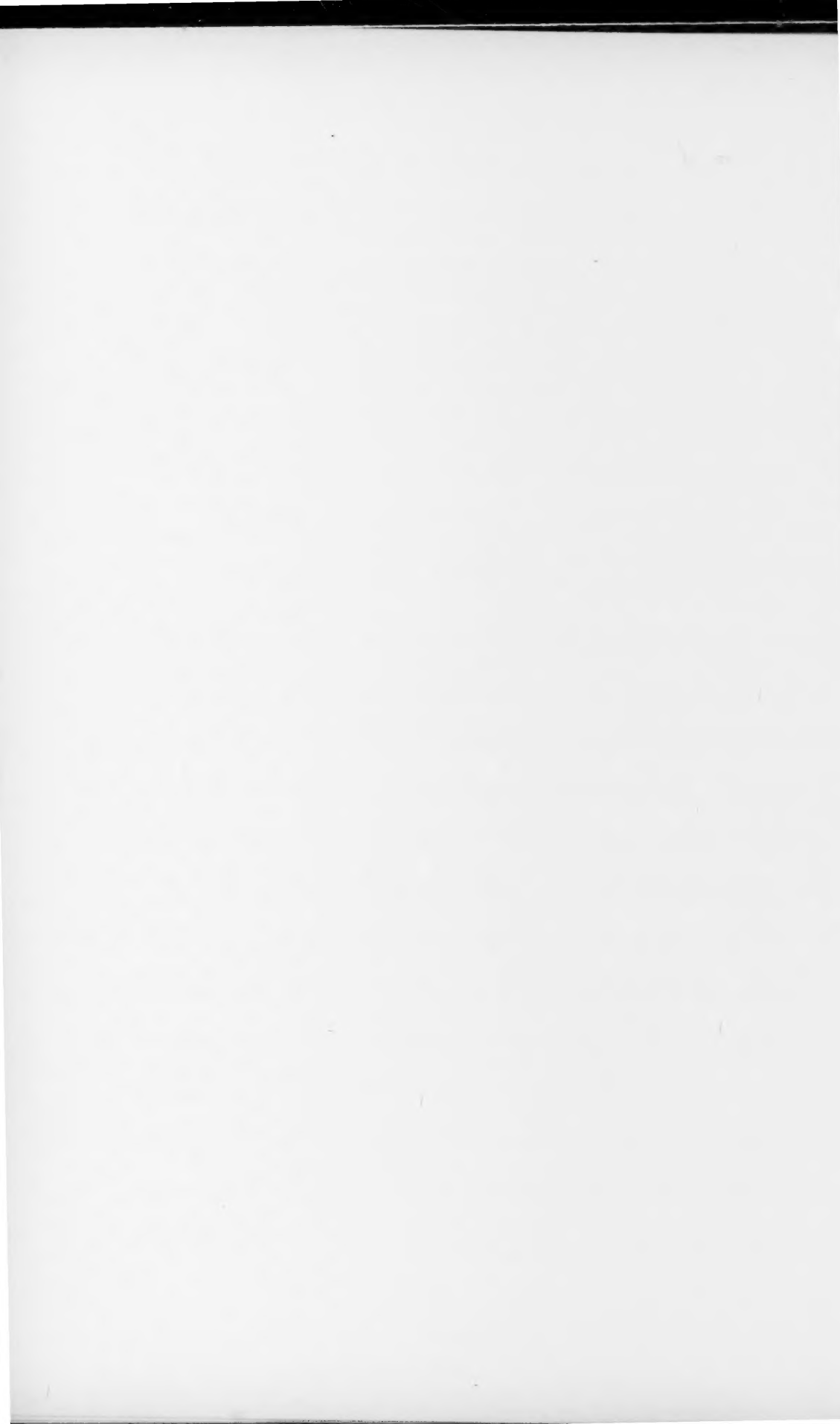


Also, it is certain DeWitt Tait held the property via conveyances from his parents and the petitioners claim ownership as the heirs of DeWitt Tait.

Consequently, the trial court erred in holding there was no valid adverse possession claim. This decision is ripe for review by this Honorable Court as being in direct contradiction of Alabama and Federal law.

2. DeWitt Tait's due process rights guaranteed him under the Fifth and Fourteenth Amendments were violated in four (4) separate ways. Consequently as heirs of DeWitt Tait, the Petitioners' due process rights were also violated in four (4) separate ways:

1: The following code sections from the Code of Alabama were in full force and effect at all times during the incidents complained of herein: Section 35-4-20 - This section requires conveyances be attested by one (1) witness when the grantor of the property can write and sign his name and requires two (2)



witnesses when the grantor cannot write his own signature; Section 35-4-23 - Acknowledgements by notary public act to comply with the witness requirements under Section 35-4-20; Section 35-4-51 - All conveyances of real property must be filed in the office of the Judge of Probate; Section 35-4-58 - The Judge of Probate must keep an accurate and complete record of all documents relating to conveyances filed in his office; Section 35-10-7 - All sales of real estate, under powers of sale contained in mortgages and deeds of trust shall be held in the county where all or part of said real estate is situated; Section 35-10-8 - Under a foreclosure sale, notice of the sale must be published three (3) consecutive weeks in a local newspaper where the property is situated. The notice of the sale must contain the time, place, terms of the sale and the property description; Section 35-10-9 - All sales of real estate, made contrary to these statutes shall be null and void;



Section 6-5-230 - There is a one (1) year right of redemption on any foreclosure sale of a mortgage.

To establish a denial of due process, a petitioner must prove that error asserted was of such magnitude that it failed to afford him fundamental fairness which is the essence of due process.

Harris v. Wyrick, 634 F.2d 1152, cert.

denied, 451 U.S. 916; 101 S.Ct. 1994; 68 L.Ed.2d 308 (10th Cir. 1980).

The general rule is that state action deprives an individual of substantive due process if the state acts in an arbitrary or capricious manner regarding the individual.

Minneapolis Auto Parts Company, Inc., vs.

City of Minneapolis, 572 F.2d 389 (7th Cir. 1983).

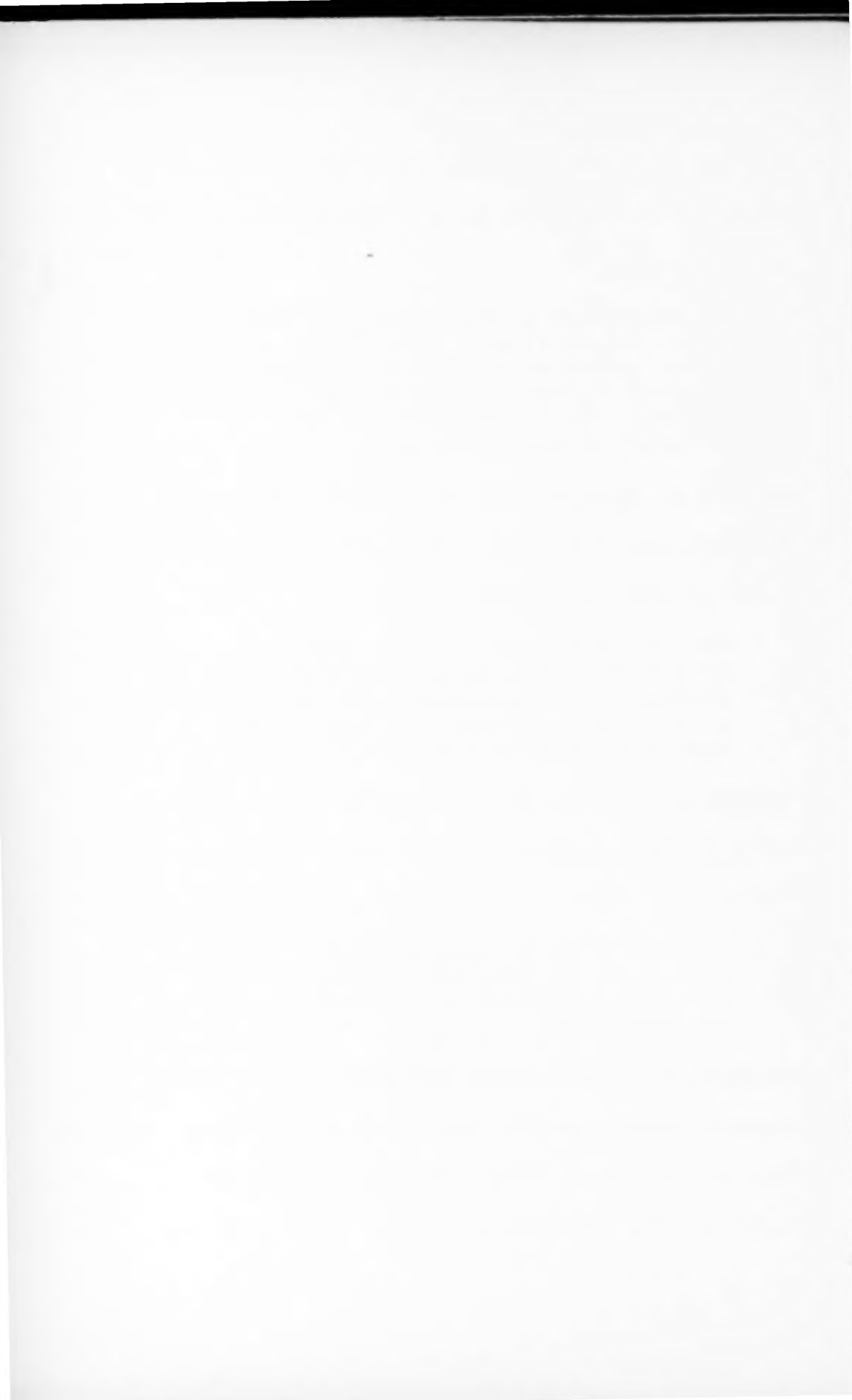
Whether a given practice is so unfair as to deny due process is always a question of federal constitutional law.

Cronnon v. State of Alabama, 557 F.2d 472,

appeal after remand, 587 F.2d 246, cert.

denied, 440 U.S. 974; 99 S.Ct. 1542; 59

L.Ed.2d 792 (5th Cir. 1977).



Due process of the Fifth Amendment includes equal protection components and Fifth Amendment equal protection claims are treated the same as Fourteenth Amendment equal protection claims.

Beller v. Middendorf, 632 F.2d 788, rehearing denied; Miller v. Rumsfeld, 647 F.2d 80, cert. denied, 452 U.S. 905; 101 S.Ct. 3030; 69 L.Ed.2d 405, cert. denied, 454 U.S. 855; 102 S.Ct. 304; 70 L.Ed.2d 150, rehearing denied, 454 U.S. 1069; 102 S.Ct. 261; 70 L.Ed.2d 605 (3rd Cir. 1980).

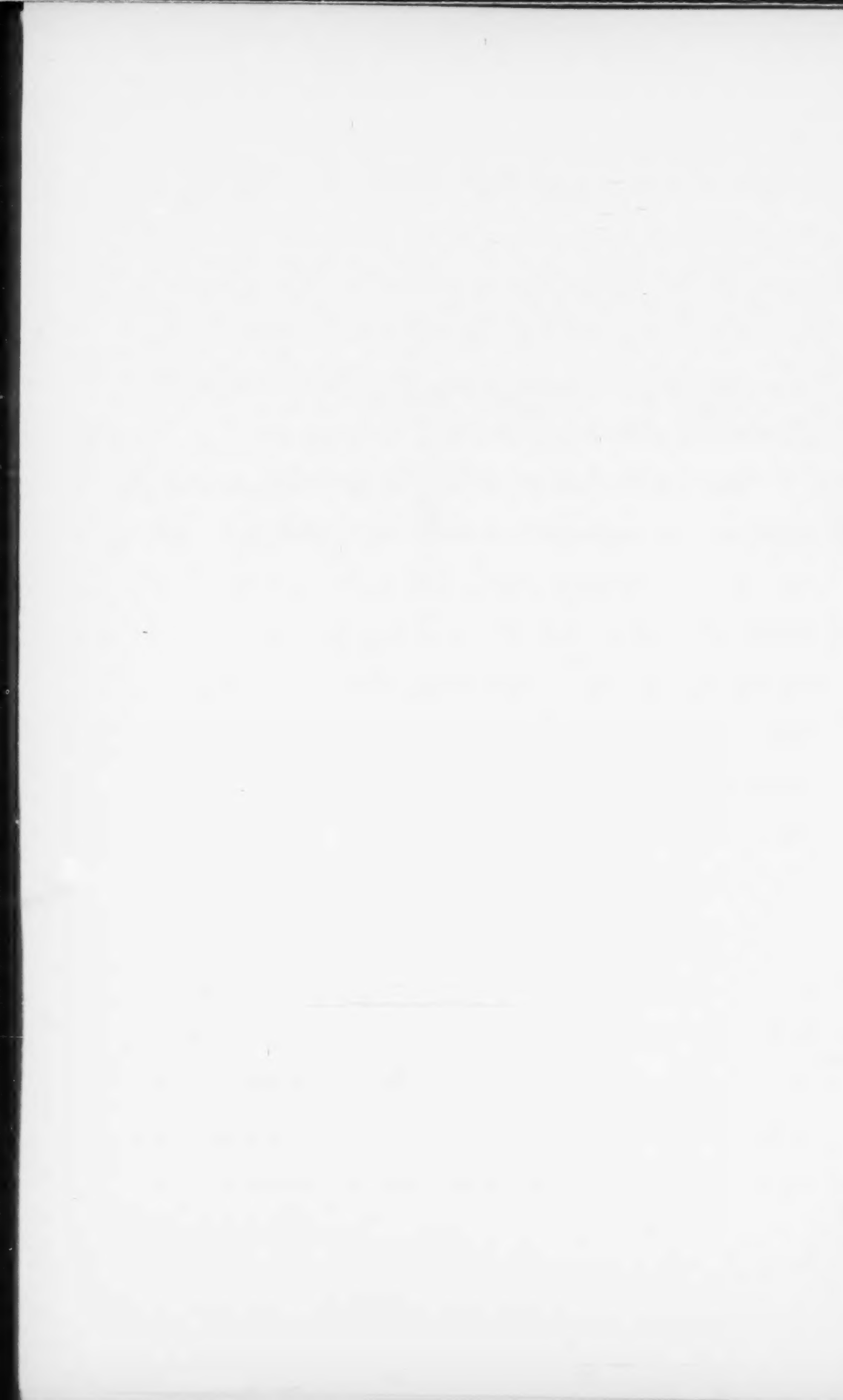
The statutes set out above are the law in Alabama regarding the proper transfer and recording of real property transfers. As the facts are set out above, each one of the statutes was violated by Monroe County Circuit Court and by the respondents. The acknowledgements on the transactions containing Mr. H. R. Betts name are improper because Mr. Betts was not a Notary Public in Monroe County where the property lay and where the documents were signed. Therefore, there was no meeting of the requirements



under Sections 35-4-20 and 35-4-23. The Judge of Probate of Monroe County, Alabama, violated Section 35-4-58 by keeping the records of the probate court in such an extreme state of disarray and confusion and by misplacing numerous, important documents involving the transactions herein.

The foreclosure notice regarding parcel A herein, is improper in two (2) aspects: One, it is not certain where the sale was held for there was no place of sale stated in the foreclosure add. Secondly, the add ran only two (2) weeks in a local newspaper, not the statutorily required three (3) weeks under Section 35-10-8.

Also, there was testimony that even if it could have been proven that Sam Lowery did legally sell and foreclose on the mortgage involved herein, DeWitt Tait, several times within the one (1) year statutory time limit under Section 6-5-230, offered to redeem the mortgage but was refused by Mr. Lowery.



Finally, Section 35-10-9, states all sales of real estate made contrary to the above cited statutes shall be null and void. Therefore, the transactions should be voided and full ownership interests and rights should be restored to the heirs of DeWitt Tait.

2:

Some form of hearing is required before an owner is finally deprived of a protected property interest.

Logan v. Zimmerman Brush Company, 455 U.S.

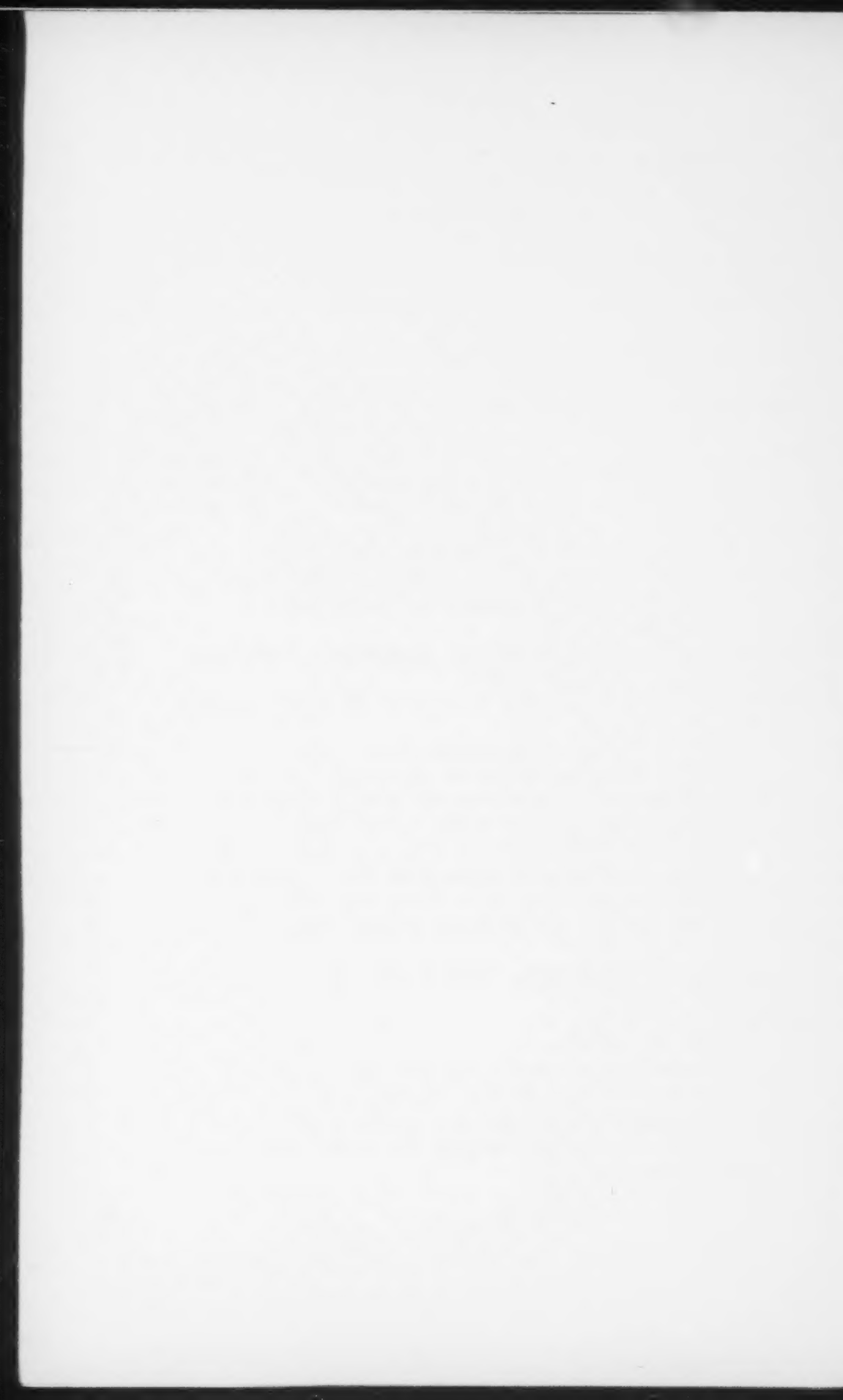
422; 102 S.Ct. 1148; 71 L.Ed.2d 265 (1982).

Once it is determined that the Plaintiff has a protected property interest, the question remaining for consideration is what form the required procedural due process must take; procedural due process requires notice and an opportunity to be heard in a meaningful manner.

Rosewitz v. Latting, 689 F.2d 175 (10th Cir.

1982).

Due process requires proper service of process in order to obtain in personam jurisdiction over either city and its agencies or individual defendants.



Amen v. City of Dearborn, 532 F.2d 554;
appeal after remand, 718 F.2d 789 (4th Cir.
1976).

When the location of an individual person is known, service by publication is not sufficient.

See Mullane v. Central Hanover Bank, 339 U.S.
306; 70 S.Ct. 652; 94 L.Ed.2d 865 (1950).

A final, valid judgment, though erroneous is not subject to a collateral attack unless it can be shown that the court rendering it was without jurisdiction, and thus collateral attack is based on grounds of fraud even if that fraud is extrinsic.

Burlington Data Processing, Inc., v.

Automated Medical Systems, Inc., 492 F.Supp.
821 (D.C. Vt. 1980).

Clearly, for a court to have proper jurisdiction, the individuals that the court seeks to govern must be properly served in accordance with the law. As stated before, Section 35-10-8 Code of Alabama, 1975, requires that under a foreclosure notice by publication, a foreclosure add must run three (3) consecutive weeks in a local newspaper,

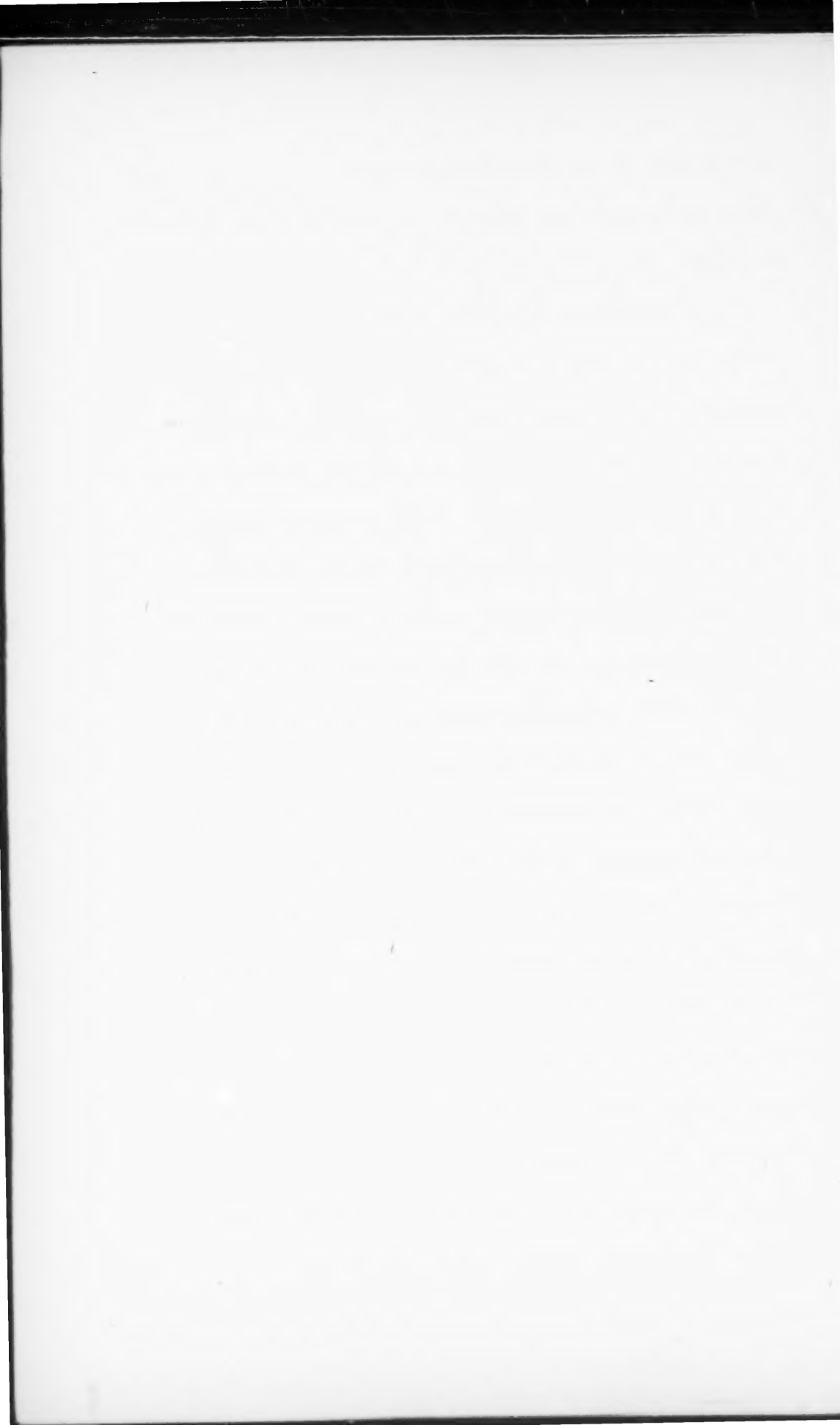


stating the time, place, terms, and giving the property description of the property involved in the sale. As shown by the Petitioner's proffer of evidence at trial, the requirements of Section 35-10-8 were not met. Furthermore, the Petitioners would assert as to any other service of process or notice involving parcel B that there is no documentary evidence whatsoever as to what type of notice was given the Petitioners' predecessor in interest. Furthermore, the Petitioners would assert under the Mullane, supra, decision by this Court that the respondents knew of the physical whereabouts of DeWitt Tait and could have easily served personal notice of any proceedings on him. In any event, notice to DeWitt Tait of the divesting of his property from him was not legally adequate. Therefore, the Probate Court of Monroe County, Alabama, did not have proper jurisdiction over DeWitt Tait. Consequently, any judgments regarding any ownership interests that DeWitt Tait had in



the properties described herein are null and void pursuant to Section 35-10-9 Code of Alabama 1975.

3: Section 35-4-59 Code of Alabama, 1975, which was in effect at the time of the conveyances complained of herein, states that a conveyance is operative as of record from the day of delivery to the probate judge. The respondents, the trial court and the Alabama Supreme Court rest a great deal of their position on the legal principal of a twenty (20) year statute of repose. They hold, as to parcel B, that final judgment in that case was issued upon the date of the sale of parcel B in 1959 to Sam G. Lowery. However, as noted in the facts above, the register's deed regarding this sale was not filed until July 28, 1965. Because the register's deed was not delivered to the probate judge until July 28, 1965, the time of running the 20 year statute of repose, pursuant to Section 35-4-59 Code of Alabama, 1975, does not start until July 28,

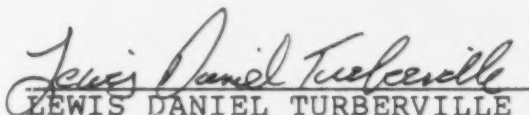


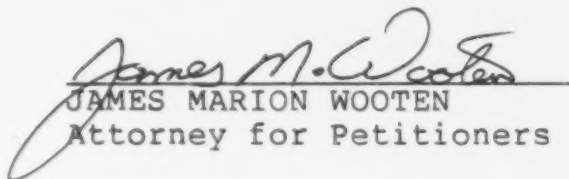
1965. As the Petitioners brought their action on March 20, 1985, they have raised valid questions and issues to the transactions regarding the parcels complained of herein, within the twenty (20) year time period of the statute of repose.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,


LEWIS DANIEL TURBERVILLE
Attorney for Petitioners

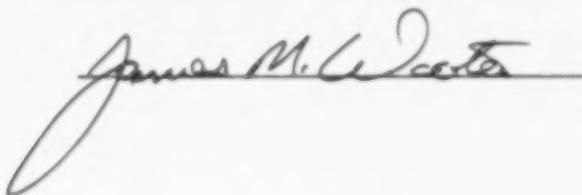

JAMES MARION WOOTEN
Attorney for Petitioners

July, 1988.



CERTIFICATE OF SERVICE

I do hereby certify that I have served a copy of the foregoing Writ of Certiorari upon the Honorable John B. Barnett, III, Attorney for the Respondents, P. O. Box 278, Monroeville, Alabama, by placing a copy of same in the U.S. Mail, first class postage prepaid this the 21 day of July, 1988.

A handwritten signature in cursive script, reading "James M. G. Carter", is written over a horizontal line.

IN THE CIRCUIT COURT OF MONROE
COUNTY, ALABAMA

MARTHA DAVISON,)

Plaintiff,)

VS.)

CIVIL ACTION CV 85-27

SAM G. LOWERY, INDI-)

VIDUALLY AND AS)

TRUSTEE OF J.F.B.)

LOWERY TRUST,)

Defendants.)

VS.)

LEOLA T. ROBINSON,)

THOMAS O. TAIT,)

ELOISE WIGGINS, MABEL)

RICHARDSON, JULIA)

MCCLAMMY, ROSE GOLD-)

SMITH, JAMES V. TAIT,)

ROBERT E. TAIT, WIL-)

LIAM TAIT, SHERESE)

TAIT, ARNETTA SALTER,)

EMERSON BERNARD TAIT,)

GEORGE A. TAIT, MARY)

ALICE STALLWORTH,)

CASSIE BANKS, TAL-)

MADGE TAIT, ALFRED)

TAIT, ERMA TAIT,)

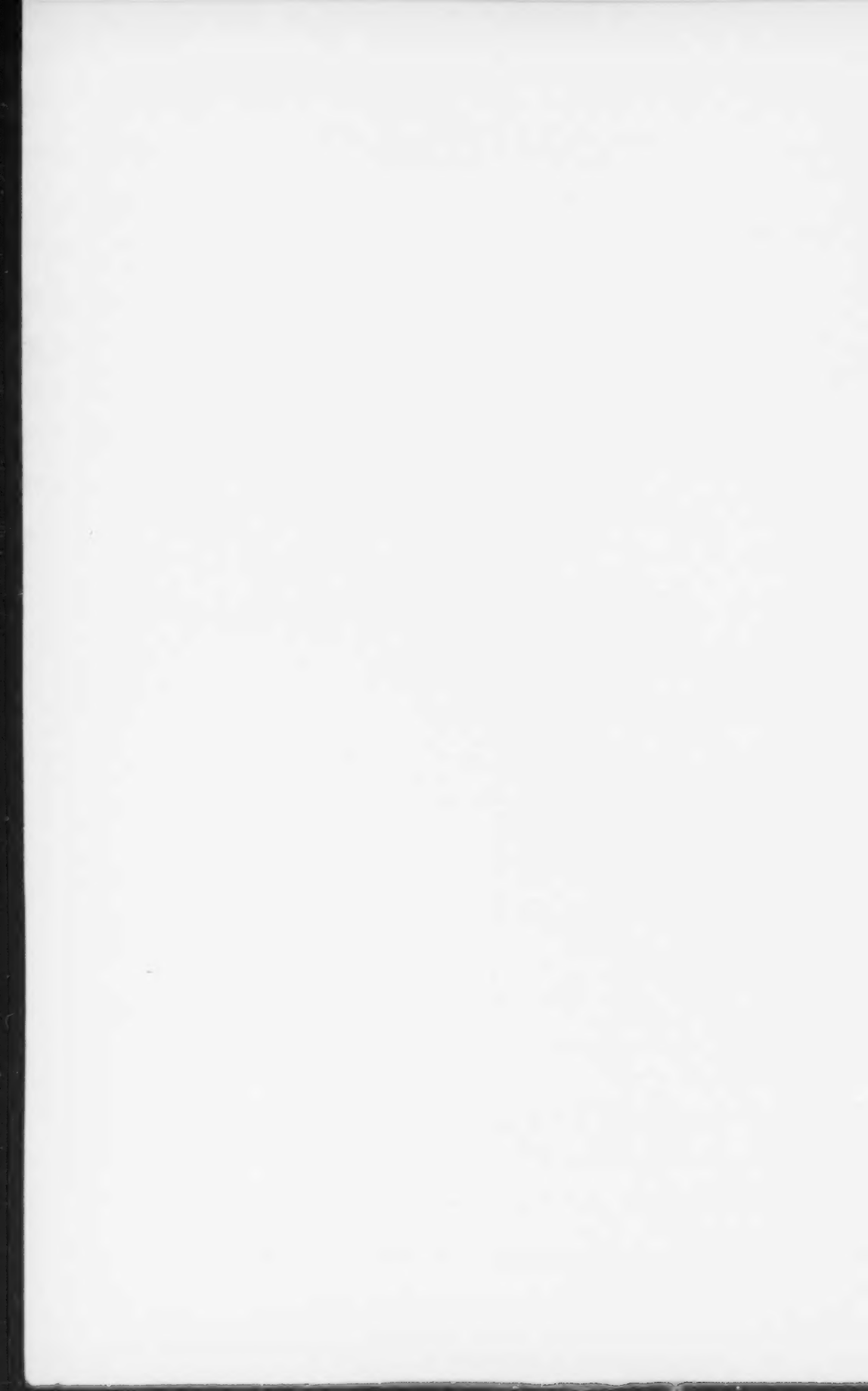
PALTON TAIT, AND MIA)

TAIT,)

Intervenor)

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND FINAL ORDER

This matter having come on to be heard
by the Court, ore tenus, on the 21st day of



January, 1987, and the Court receiving into evidence various deeds, other documentary evidence, and testimony the Court finds as follows:

1. The registers deed dated the 28th day of July, 1965, shown as Defendant's Exhibit No. 8 is a good and valid deed and effectively conveys to Defendant, Lowery, the entire forty (40) acres in which the disputed four (4) acre and three (3) acre tracts are situated and effectively conveys the interests of DeWitt Tait, the Plaintiff and Intervenor Plaintiffs predecessor in title to Defendant, Lowery.

2. That the recitals contained in said deed correctly reflect that the case of Frank Tait against Elizabeth Snyder, et al. proceeded to final decree of sale dated June 5, 1959.

3. That the sale was had on the 29th day of June, 1959, at which time Sam G. Lowrey, as Trustee, was the highest and last bidder and thereby purchased the property in

question here having paid the purchase price recited therein into Court.

4. That all parties were properly before the Court in said proceedings and that those proceedings were proper in every respect and effectively conveyed the entire undivided fee interest to Defendant, Lowrey, as Trustee, as stated therein.

5. This Court then proceeding to take testimony from the Plaintiffs regarding their claim of adverse possession of the disputed lands, finds insufficient evidence to establish adverse possession in the Plaintiffs and Intervenor Plaintiffs.

Whereupon, motion by Defendant, Lowery, for a judgment in his favor, at the close of the Plaintiff's evidence, the Court having taken same under submission, the Court now grants said motion.

IT IS THEREFORE, ORDERED, ADJUDGED, and DECREED, that Sam G. Lowrey as Trustee of the J.F.B. Lowrey Trust is the owner of the Northwest quarter of the Southeast quarter,

Section Twenty-One (21), Township Seven (7) North, Range Nine (9) East, with other lands situated therein by virtue of the title conveyed to him by the registers deed dated the 28th day of July, 1965, and recorded in Deed Book 237 at Pages 62-63 in the Office of the Probate Judge of Monroe County, Alabama, and by virtue of his returning and assessing same for taxes for over twenty (20) years and being in possession thereof.

The foregoing finding by the Court obviates any need for further ruling as to the validity, vel non, of any prior foreclosure action or other proceedings between these parties or their predecessors in title.

IT IS ORDERED, ADJUDGED, and DECREED, that the cost of this action be taxed against the Plaintiffs for which let execution issue.

DONE at Monroeville, Alabama, this 18th day of February, 1987.

CIRCUIT JUDGE



THE STATE OF ALABAMA - - JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
OCTOBER TERM, 1987-88

Martha Davison, et al.

86-1056

v.

Sam G. Lowery, individually and as
trustee of the J. F. B. Lowery Trust
Appeal from Monroe Circuit Court

MADDOX, JUSTICE.

This case involves a land dispute. The plaintiffs all claim an interest in land owned by the defendant in Monroe County. The plaintiffs asserted their claim on two theories: first, adverse possession; and second, that a 1959 judgment rendered in an action involving a judicial sale of the land is void. On this appeal the plaintiffs do not argue the adverse possession claim, and only assert facts relating to the validity of the 1959 judgment.



In 1959 the Circuit Court of Monroe County heard Case No. 3080, Tait v. Snyder. That action sought a partition or sale of the land that is the subject of this dispute. The plaintiffs claim that their predecessor in interest, DeWitt Tait, was not given notice of that action, and that the judgment is, therefore, void as to him and his heirs. After the judgment in that case, the land was sold to Sam G. Lowery in a judicial sale. The register's deed recites that the judgment in Tait v. Snyder was entered on June 5, 1959.

The trial judge in the present action, sitting without a jury, heard the evidence on the adverse possession claim and then allowed the plaintiffs to make a "proffer of evidence" on their claim that the 1959 judgment was void. This proffer of evidence showed the following facts, which, plaintiffs contend, shows that the 1959 action was void as to Tait and his heirs:

1. The docket fee book of 1959 shows no sheriff's fees paid for service of process as to Tait.

2. The fee book does not show any distribution to any of the defendants (i.e., the defendants in the 1959 action) of money from the sale of the property Lowery bought.

3. The Equity Division index does not indicate any final disposition of case No. 3080.

4. Proof could be made of only two publications in the local newspaper.¹

The plaintiffs also offered to prove that this evidence would have been given by the proper custodians of the records, and that in all cases diligent searches for the records

¹We note that although Rule 4, Ala. R. Civ. P., now requires four publications to accomplish notice by publication, the local equity rules in 1959 may have been different. See Code 1940, Tit. 47, § 196.

in question had been made. The plaintiffs claim that this evidence shows that Tait was never properly served with process in the 1959 case and that the 1959 judgment was, therefore, void as to him and his successors in interest and resulted in Tait's being deprived of his property without the due process of law guaranteed by the U.S. Constitution.

The trial judge in this present case issued written findings of fact and conclusions of law, and entered a judgment in favor of the defendants.

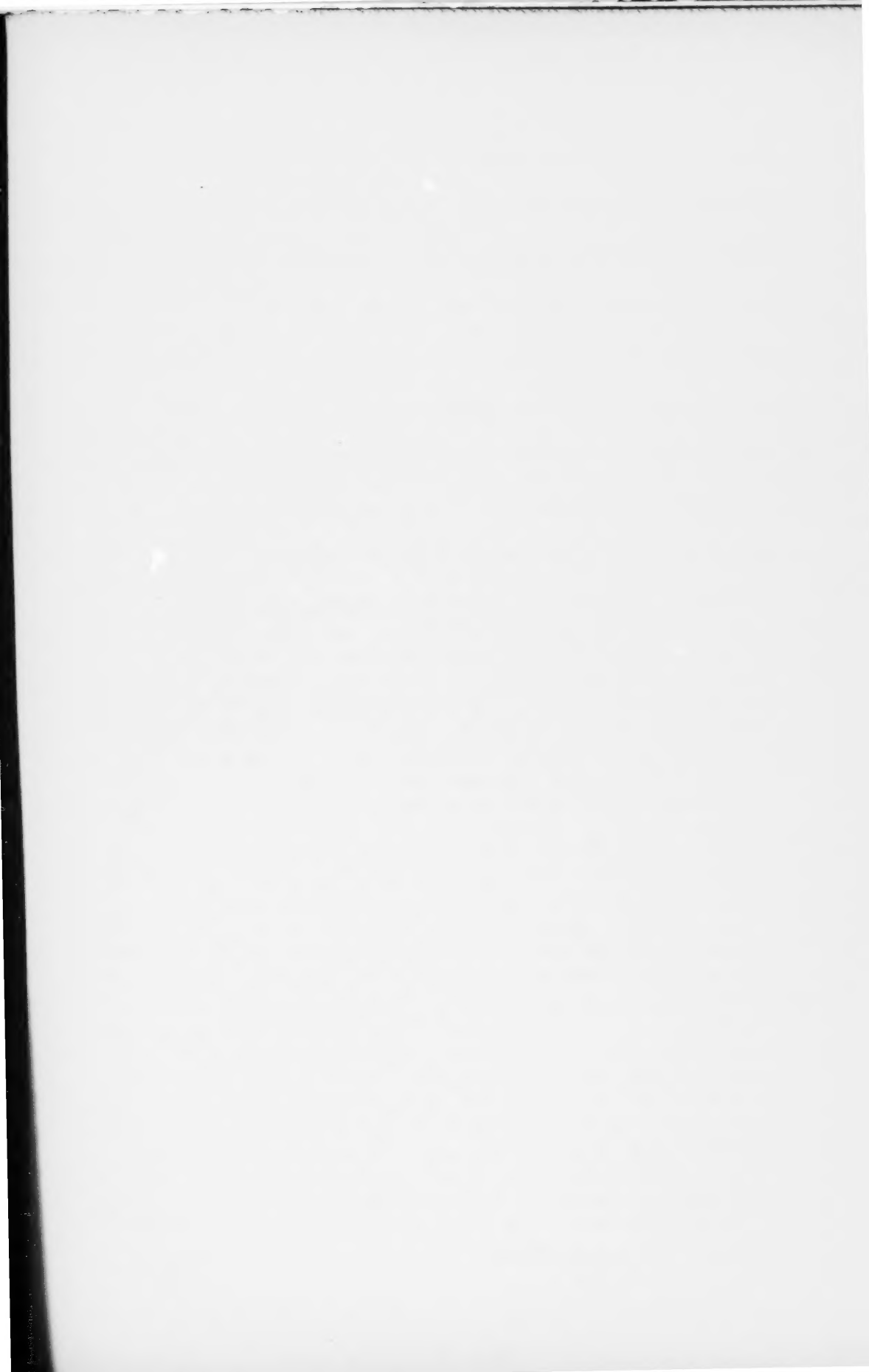
First, we note, as stated earlier, that the appellants do not argue the propriety of the trial judge's order on the adverse possession claim. They do not raise any issue or cite any authority on this point, as required by Rule 28(c)(4), Ala. R. App. P. When an appellant fails to argue an issue in this brief, that issue is waived. Boshell v. Keith, 418 So.2d 89 (Ala. 1982). The trial court's judgment on the adverse possession



issue is therefore due to be affirmed.

Second, we note that this action was not brought under Rule 60(b)(4), Ala. R. Civ. P., which provides for relief from a final judgment, if the final judgment is void or should be set aside. Regardless of how the validity of the 1959 judgment is raised, plaintiffs' claim must fail because of Alabama's well-settled rule of repose.

"As a matter of public policy, and for the repose of society, it has long been the settled policy of this state, as of others, that antiquated demands will not be considered by the courts, and that, without regard to any statute of limitations, there must be a time beyond which human transactions will not be inquired into. It is necessary for the peace and security of society that there should be an end of litigation, and it is inequitable to allow those who have slept upon their rights for a period of 20 years, after they might have demanded an accounting, and after, as is generally the case, the memory of transactions has faded and parties and witnesses passed away, to demand an accounting. The consensus of opinion in the present day is that such presumption is conclusive, and the period of 20 years ... is a complete bar; and, as said in an early case, 'the presumption rests not only on the want of diligence in asserting rights, but on



the higher ground that it is necessary to suppress frauds, to avoid long dormant claims, which, it has been said, have often more of cruelty than of justice in them, that it conduces to peace of society and the happiness of families, and relieves courts from the necessity of adjudicating rights so obscured by the lapse of time and the accidents of life that the attainment of truth and justice is next to impossible.'"

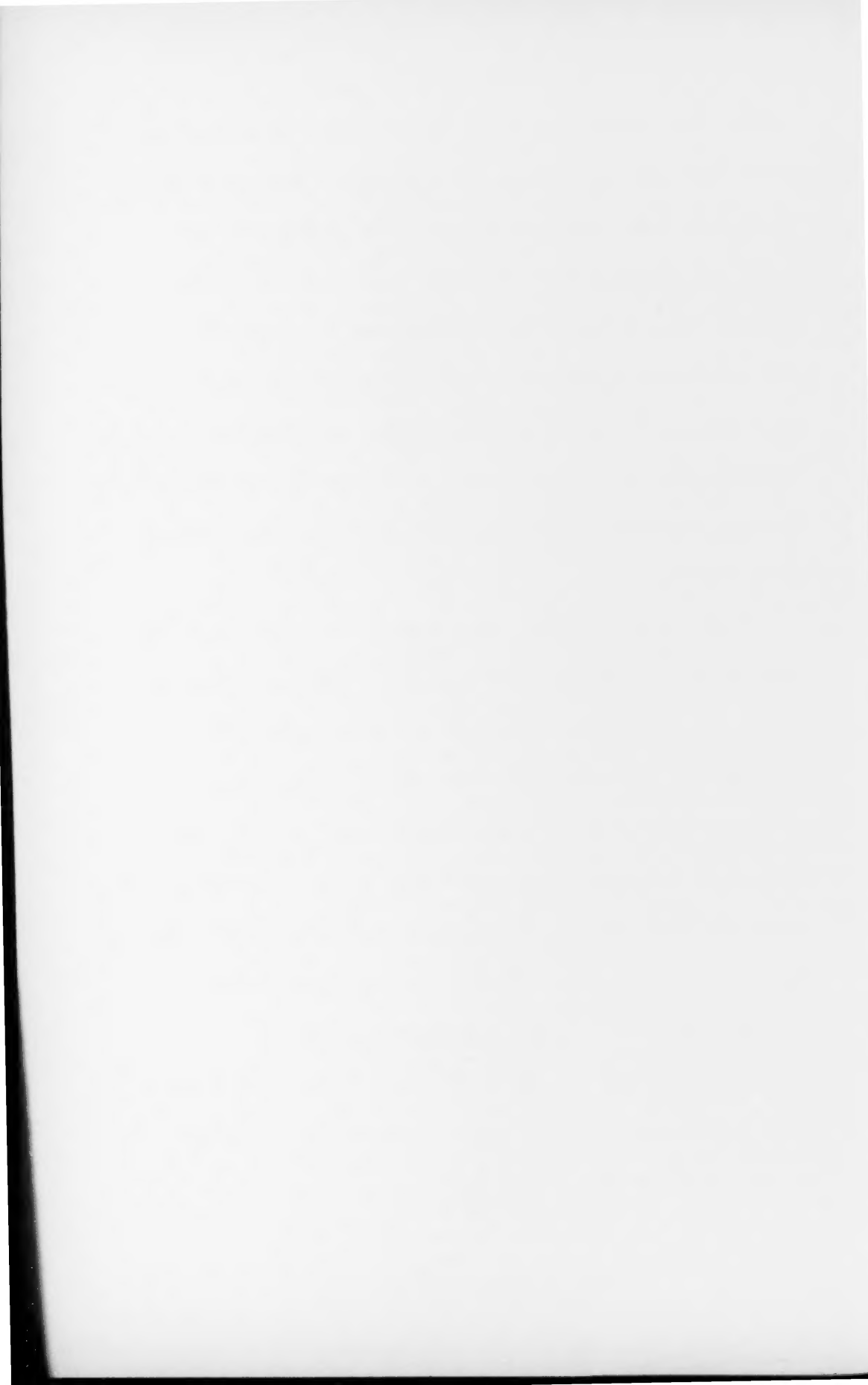
Barrett v. Wedgeworth, [Ms. 85-795. December 21, 1987] ____ So.2d ____ (Ala. 1987), quoting Snodgrass v. Snodgrass, 176 Ala. 275, 180-81, 58 So. 201, 201-202 (1912) (citations omitted); Boshell v. Keith, 418 So.2d 89, 91 (Ala. 1982).

The trial judge found, as a matter of fact, that the final judgment in Tait v. Snyder, was issued on June 5, 1959, and that the sale took place on June 29, 1959, as recited in the register's deed. The sum paid was \$3,268.00. The plaintiffs argue that the 20 year rule of repose should not apply because the register's deed was not issued until July 28, 1965, and this suit was filed on March 20, 1985 -- four months short of 20 years later. We disagree. The final judgment in this case was issued on June 5,



1959, and that date is the starting point for calculating the rule of repose. Because over 20 years had passed after the judgment in Tait v. Snyder was issued and before this action was filed, we hold that it was barred. The difficulties that arise with the passage of time, as noted above, have manifested themselves in this case, and the rationale behind the rule of repose is here distinctly applicable.

The trial judge decided this case against the plaintiffs on the merits. Regardless of the reasoning by the court, the judgment correctly determines the case. Assuming, without deciding, that the trial court used incorrect reasoning, we hold that the decision is correct. A correct decision will not be disturbed even if the court gives the wrong reasons. City of Montgomery v. Couturier, 373 So.2d 625, 627 (Ala. 1979). The judgment of the trial court is, therefore, due to be affirmed.



AFFIRMED

Torbert, C.J., and Almon, Beatty, and
Houston, JJ., concur.

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

Re: 86-1056

Martha Davis, et al. vs. Sam G. Lowery, Ind.
Appellant Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

_____ Appeal docketed. Future correspondence should refer to the above number.

_____ Court Reporter granted additional time to file reporter's transcript to and including

_____ Clerk/Register granted additional time to file clerk's record/record on appeal to and including

_____ Appell_____ granted 7 additional days to file briefs to and including

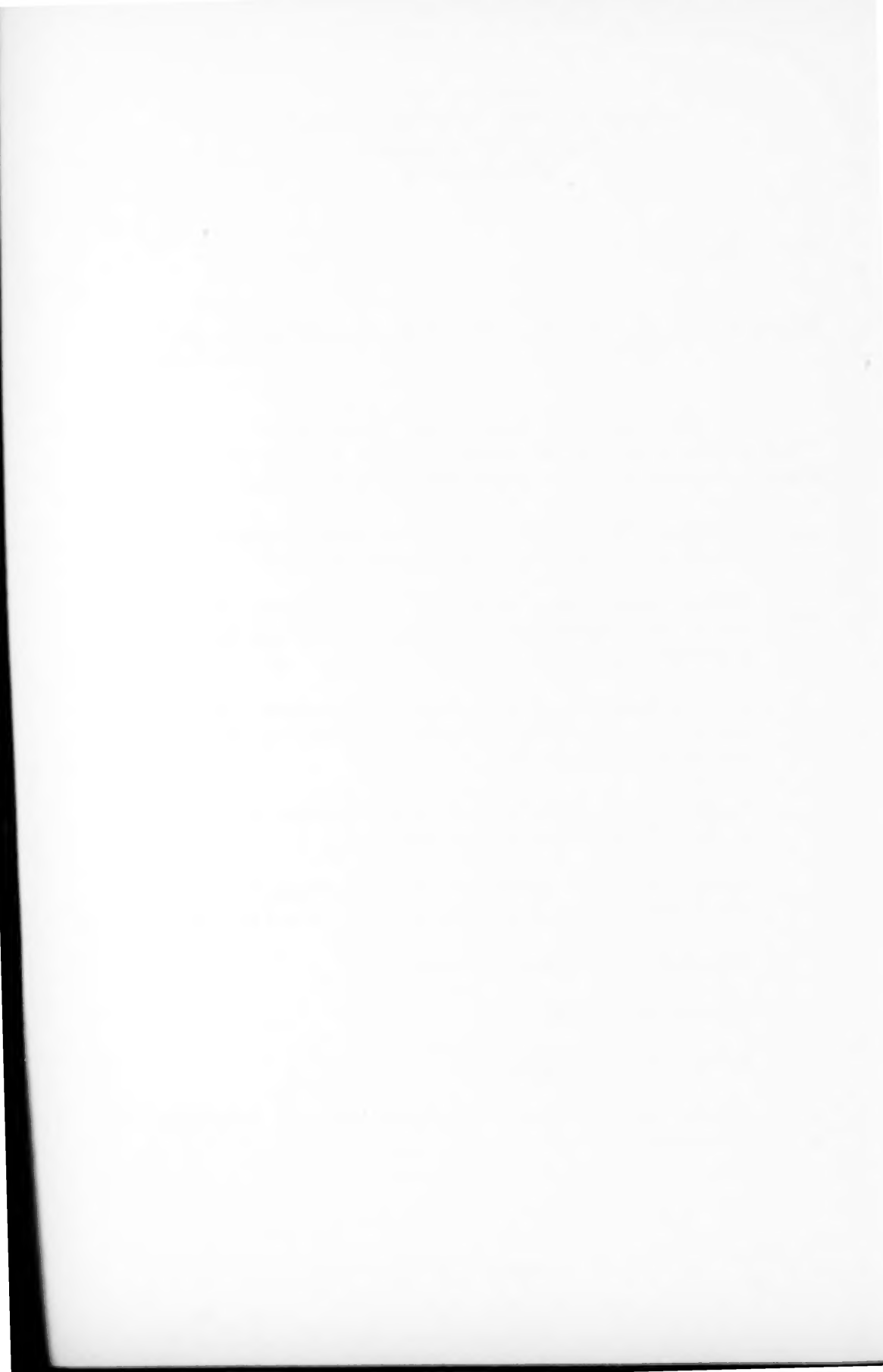
_____ Appellant(s) granted 7 additional days to file reply briefs to and including

_____ Record on Appeal filed

_____ Appendix Filed

_____ Submitted on Briefs

_____ Petition for Writ of Certiorari denied.
No opinion.



XX Application for rehearing overruled. No
opinion written on rehearing.
Maddox, Jr., - Torbert, C.J., Almon,
Beatty & Houston, JJ., concur.

_____ Permission to file amicus curiae briefs
granted.

4/22/88
bsa

ROBERT G. ESDALE, Clerk
Supreme Court of Alabama